Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEUBERGER, RHODA SEIDEL, and BARBARA SHACK,

Petitioners,

—against—

WILLIAM CAHN, District Attorney, Nassau County and EUGENE NICKERSON, County Executive, Nassau County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

—against—

WILLIAM CAHN, District Attorney, Nassau County and EUGENE NICKERSON, County Executive, Nassau County,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari prior to judgment issue to the United States Court of Appeals for the Second Circuit to review the judgment of the statutory United States District Court for the Eastern District of New York, entered in the above-entitled case on June 22, 1970. Pursuant to the jurisdictional rule announced by this Court in *Mitchell* v. *Donovan*, —— U.S. ——, 38 U.S. L.W. 4514 (June 15, 1970), the above-entitled case was appealed by the respondents to the United States Court of Appeals for the Second Circuit on July 10, 1970. Peti-

tioners' motion to expedite said appeal was denied by Hon. J. Joseph Smith on August 17, 1970. Said appeal was docketed on August 19, 1970.

Opinions Below

The decision of the statutory United States District Court for the Eastern District of New York has not yet been reported. The majority opinion, by Hon. Leonard P. Moore, with Hon. John R. Bartels concurring, is set forth in the Appendix beginning at p. 1a. The dissenting opinion of Hon. Anthony P. Travia is set forth in the Appendix beginning at p. 15a. The order of Hon. J. Joseph Smith denying petitioner's motion to expedite the appeal herein is set forth in the Appendix at p. 21a. No judgment has been issued by the United States Court of Appeals for the Second Circuit.

Jurisdiction

The judgment of the statutory United States District Court was entered on June 22, 1970. Respondents' Notice of Appeal to the Court of Appeals was filed on July 10, 1970. The appeal was docketed in the United States Court of Appeals for the Second Circuit on August 19, 1970. Petitioners' motion to expedite the appeal was denied on August 17, 1970. Respondents' brief and appendix need not be served and filed until September 28, 1970. The Court of Appeals has, of course, entered no judgment herein. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §1254(1) and Rule 20 of the Rules of the Supreme Court of the United States.

Question Presented

May New York State constitutionally enact a criminal statute which absolutely prohibits the respectful display of an American flag, or any representation thereof, in conjunction with any symbol, slogan or emblem as a means of dramatizing political beliefs.

Constitutional and Statutory Provisions Involved

Section 136 of New York's General Business Law

§136. *Exhibition or display of the flag.*

Any person who: a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or

* * * * *

d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or

* * * * *

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America

* * * * * *

Shall be guilty of a misdemeanor.

The words flag, standard, color, shield or ensign, as used in this section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York.

Title 28 U.S.C. §1254(1)

§1254. *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Statement of the Case

On January 15, 1970, the respondent, William Cahn, in his capacity as District Attorney of Nassau County, announced at a news conference held solely for that purpose that commencing on Monday, January 19, 1970, he would prosecute under Section 136(a) of New York's General Business Law any person found in Nassau County exhibiting or distributing any representation of the American flag in conjunction with any political emblem or slogan. Respondent specifically singled out the emblem widely distributed by petitioners, consisting of a circular representation of the American flag, having seven stars and eleven stripes, upon which a traditional peace symbol is superimposed, as one which would invite prosecution if displayed in Nassau County after January 19, 1970.

On January 16, 1970, Hon. Jacob Mishler ordered respondents to show cause why a statutory three judge District Court should not be convened. No equitable relief was granted in view of respondent's representation to the Court that he would refrain from commencing prosecutions during the pendency of the Federal Court proceedings.

On January 27, 1970, Hon. John R. Bartels ordered the convocation of a statutory three judge District Court. Plenary argument on the constitutionality of Section 136 (a) was held before Hon. Leonard P. Moore, Hon. John R. Bartels, and Hon. Anthony P. Travia. On June 22, 1970, Judge Moore, speaking for a majority, ruled that Section 136(a) could not be applied to petitioners' emblem because it did not constitute a "flag." Judge Moore ruled, however, that as applied to flags, Section 136(a) did not violate the

constitution. Judge Travia dissented on the ground that petitioner's emblem clearly fell within the definition of flag contained in the statute and that the State's interest in protecting the integrity of the flag would justify the imposition of penal sanctions upon petitioners.

Since the respondents pledged to respect the decision of the District Court pending appeal, no injunctive relief was issued by the District Court. Accordingly, pursuant to the newly enunciated jurisdictional rule of *Mitchell* v. *Donovan*, —— U.S. ——, 38 U.S.L.W. 4514 (June 15, 1970), the respondent Cahn filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit on July 10, 1970 and docketed his appeal on August 19, 1970. Petitioners' motion to expedite the appeal in the Court of Appeals was denied on August 17, 1970.

Although the respondent Cahn has respected his pledge to refrain from prosecuting petitioners pending the outcome of the instant case, arrests and prosecutions for displaying the emblem in question have reached epidemic proportions elsewhere in New York State.

In the City of New York alone, counsel herein represent over 40 persons who have been charged with displaying the emblem in question, usually as a decal on the rear automobile windshield. Hardly a day passes that a new arrest is not reported. Attempts to seek a moratorium by the New York City Police Department on new arrests pending the outcome of the instant case have ended in failure.

Reasons for Granting the Writ Prior to Judgment

Petitioners seek the extraordinary relief of certiorari prior to judgment in the belief that the instant case presents issues of great public importance which parallel and complement the difficult constitutional questions raised in *Radich* v. *New York*, October Term 1969, No. 1589, currently pending before this Court. See, generally, *Hannah* v. *Slawson*, 361 U.S. 910 (1959); *United States* v. *Thomas*, 361 U.S. 950 (1960); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 12 (1963); *Hannah* v. *Larche*, 363 U.S. 420, 422, n. 3 (1960); *McElroy* v. *Guagliardo*, 361 U.S. 281, 283 (1960); *Reid* v. *Covert*, 340 U.S. 1, 5 (1957); *White* v. *Mechanics' Securities Corporation*, 269 U.S. 283, 299 (1925); *Johnson* v. *United States Shipping Board*, 280 U.S. 320, 324-325 (1930); *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 411-412, 415 n. 2 (1931); *Bolling* v. *Sharpe*, 344 U.S. 873 (1952); *Taylor* v. *McElroy*, 358 U.S. 918 (1958), 360 U.S. 709, 710 (1959); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946); *Staiuback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 370-371 (1949).

In *Radich*, Sections 136(d) and 136(f) of New York's General Business Law, which prohibit "casting contempt" upon the American flag are challenged as violative of the constitution. The basic issue posed in *Radich*, is whether the state may punish contemptuous usage of the flag which is intended to communicate an idea.

In the instant case, all concede that no contemptuous usage of the flag has occurred. Instead, New York State seeks, pursuant to Section 136(a) of its General Business Law, to prohibit absolutely even respectful usage of the flag as an aid in the transmission of ideas.

Thus, the two cases, when viewed together, present the entire spectrum of flag usage in a communicative context—beginning with disrespect and contempt and running the gamut to respectful adoption. Given the complementary nature of the issues raised by *Radich* and *Long Island Viet Nam Moratorium*, it is respectfully submitted that the interests of judicial economy would be served by granting the writ herein and consolidating the instant case for argument with *Radich* v. *New York*.[1]

Substantive Reasons for Granting the Writ

Introduction

This case is another in a series of judicial explorations into the constitutional implications of state imposed flag veneration. E.g., *West Virginia* v. *Barnette*, 319 U.S. 324 (1943); *Frain* v. *Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969); *Street* v. *New York*, 394 U.S. 576 (1969); *Halter* v. *Nebraska*, 205 U.S. 34 (1907). See generally, *Render Unto Caesar: The Flag Salute Controversy* (University of Chicago Press 1962). In each case, the underlying dilemma has been the extent to which a free society may compel respect or veneration for its flag. Petitioners believe that in a free society no person should be compelled to make ritualistic obeisance to a trapping of the state, whether by being forced to salute it or by being forced to treat it as though it were the secular equivalent of a religious icon.

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[1] It would appear highly artificial to require the instant case to undergo a potentially superfluous appeal to the Court of Appeals while the potentially controlling precedent (*Radich*) is decided by this Court. The artificiality is heightened by the fact that had the District Court enjoined respondent, rather than relying upon his good faith, a direct appeal to this Court would have unquestionably been available.

Our society has consistently resisted the inevitable pressures to create a secular religion based upon the worship of the state and its trappings. Our flag, as the emblem of a society of free men, must symbolize, paradoxically, the right of free men to do with it as their consciences dictate. Those who would ignore that paradox, inherent in the very nature of freedom, are the true, if inadvertent, defilers of our national symbol.

No State May Constitutionally Impose an Absolute Bar Upon the Use of the American Flag as an Aid in the Communication of Ideas

Section 136(a) of New York's General Business Law is nothing less than an attempt to effect a total insulation of the American flag from the realm of ideas. It purports to outlaw respectful as well as contemptuous usage. It purports to outlaw traditional as well as newly evolved forms of communicative activity.

Since the statute serves no purpose other than the impermissible state interest in compelling veneration for the flag, and since the statute purports to prohibit traditional modes of communicative activity, it is clearly unconstitutional.

1. *Section 136(a) Protects No Valid State Interest*

In *Street* v. *New York*, 394 U.S. 576 (1969), Mr. Justice Harlan, writing for the Court, enumerated the potential state interests which a flag veneration statute could conceivably serve. *Id.* at 590-591. Mr. Justice Harlan listed (1) a prohibition upon incitement to unlawful activity; (2) an interest in preventing breaches of the peace caused

by hostile reactions to a partisan use of the flag; (3) an interest in protecting the sensibilities of passers-by who might be offended by a particular use of flag; and (4) an interest in assuring that citizens maintain proper respect for the flag.

Clearly, the statute in question is not designed to deal with alleged incitements to unlawful acts.

Nor can the statute be sustained as an attempt to prevent public disorder caused by a hostile audience. The mere fact that a given communicative act may displease onlookers and even rouse them to anger cannot justify the suppression of such communication. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Cox* v. *Louisiana*, 379 U.S. 536 (1965). The First Amendment could not long survive the existence of a "heckler's veto."

Mr. Justice Harlan properly gave short shrift to the third possible state interest underlying flag veneration statutes—that of protecting the sensibilities of passers-by. He stated:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, *supra*, at 592.

Finally, Mr. Justice Harlan, drawing heavily upon *West Virginia* v. *Barnette*, *supra*, dismissed the state interest in compelling proper respect for the flag as being unworthy of a free society. *Street* v. *New York*, *supra*, at 593.

An analysis of Section 136(a) reveals that its only possible purpose is the compulsion of respect for the flag. In fact, both Judge Moore, writing for the majority, and Judge Travia, dissenting, recognized that protection of the flag is the statute's sole purpose. As Mr. Justice Harlan has recognized, such a purpose is simply unworthy of a free society.

2. *The Protected Nature of Petitioner's Communicative Activity*

Street v. *New York*, 394 U.S. 576 (1969), held that traditional modes of First Amendment activity involving the flag were absolutely protected from governmental harassment, even if the traditional First Amendment activity cast contempt upon the flag.

Therefore, if the petitioners were engaged in a traditional mode of First Amendment activity "akin to pure speech," their communicative activity is absolutely protected.

Historically, it has been traditional to superimpose emblems, symbols and slogans upon a representation of the American flag in order to dramatize a political message. See Exhibits A-J to this petition.

In *Tinker* v. *Des Moines*, 393 U.S. 503 (1969), this Court ruled that the display of political emblems was traditional First Amendment activity entitled to plenary constitutional protection. Mr. Justice Fortas, writing for the Court, explicitly noted that the display of political emblems was "akin to pure speech" and entitled to the same degree of constitutional protection as verbal speech. *Tinker* v. *Des Moines*, *supra*, at 505-506.

In so ruling, the Court was merely reaffirming the doctrine, enunciated in *Stromberg* v. *California*, 283 U.S. 359 (1931), that the display of banners and emblems is fully protected by the First Amendment. See also, *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966).

Thus, in displaying political emblems involving the American flag, petitioners are engaged in a traditional mode of communicative activity "akin to pure speech" and the rationale of *Street* requires that New York's attempt to outlaw the communication because the flag is involved must be condemned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Exhibit A

[United States Information Agency Poster
(Moscow—1959)]

АМЕРИКАНСКАЯ

ВЫСТАВКА

В ПАРКЕ «СОКОЛЬНИКИ»

МОСКВА. 25-го ИЮЛЯ—1-го СЕНТЯБРЯ 1959 г.
ОТКРЫТА ЕЖЕДНЕВНО с 11.00 до 22.00 час.

Билеты продаются в театральных кассах и в кассах при входах в парк «Сокольники».
Входная плата для взрослых—1 руб., для детей и рядовых военнослужащих—50 коп.

Exhibit B

[United States Marine Corps Recruiting Poster]

Exhibit C

[World War I Recruiting Poster]

Exhibit D

[CAMPAIGN BANNER OF THE NATIVE AMERICAN PARTY—1844]

Exhibit E

[CAMPAIGN BANNER OF HENRY CLAY—1844]

Exhibit F

[CAMPAIGN BANNER OF HENRY CLAY—*circa* 1844]

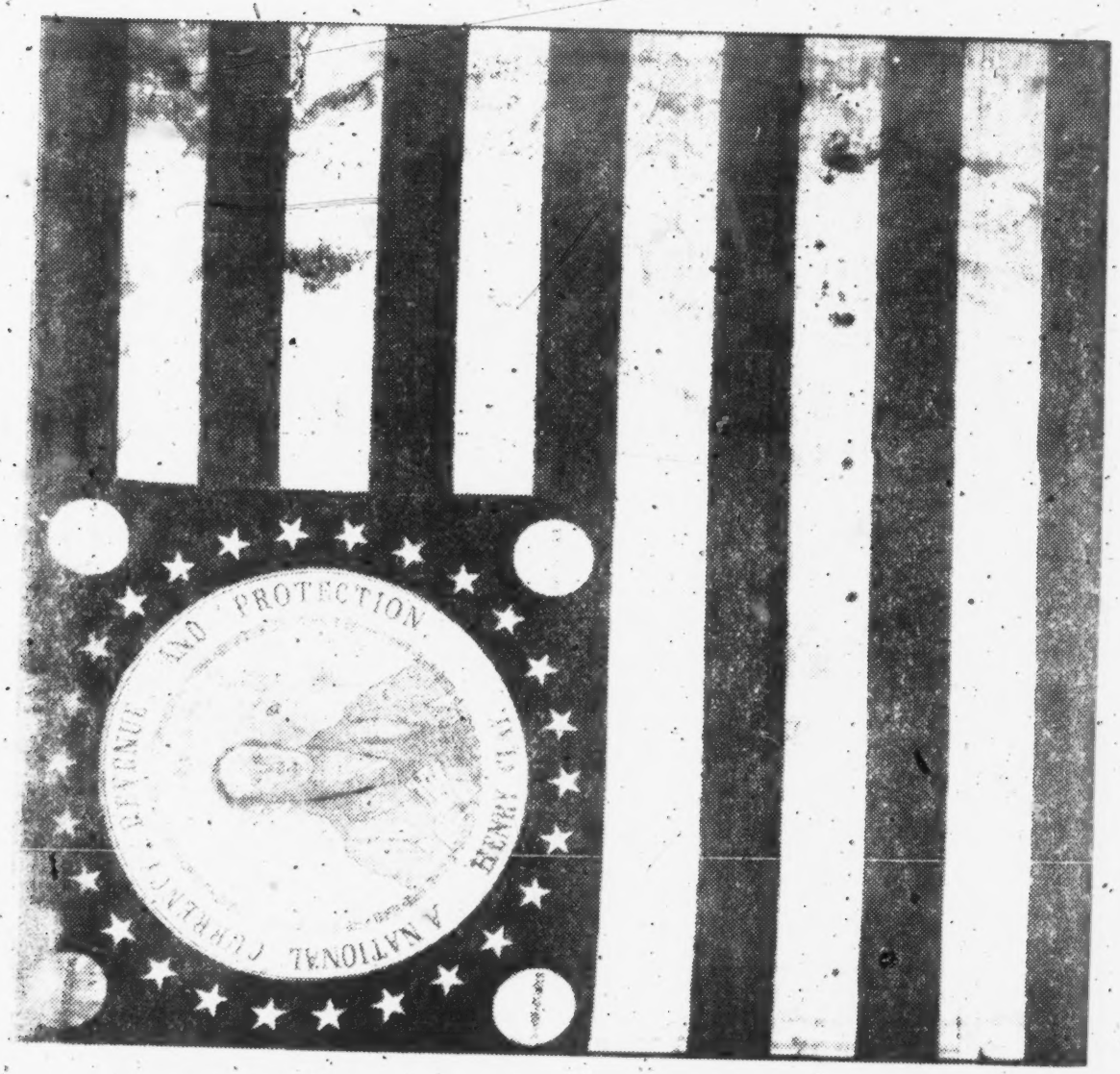

Exhibit G

[CAMPAIGN BANNER OF JOHN BELL—1860]

Exhibit H

[CAMPAIGN BANNER OF ABRAHAM LINCOLN—1860]

Exhibit I

[CAMPAIGN BANNER OF ABRAHAM LINCOLN—1864]

Exhibit J

[Campaign Banner of Ulysses S. Grant—1868]

APPENDIX

Majority Opinion by Hon. Leonard P. Moore, Hon. John R. Bartels Concurring

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

70-Civ.-56

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEUBERGER, RHODA SEIDEL, and BARBARA SHACK,

Plaintiffs,

—against—

WILLIAM CAHN, District Attorney, Nassau County and EUGENE NICKERSON, County Executive, Nassau County,

Defendants.

Appearances:

BURT NEUBORNE, New York, N. Y. (Carl Binder, New York Civil Liberties Union, New York, N. Y., of counsel), *for Plaintiffs.*

STEVEN M. HOCHBERG, New York, N. Y. (Louis J. Lefkowitz, Attorney General of The State of New York, The Capitol, Albany, N. Y., of counsel), *for Defendants.*

HON. LEONARD P. MOORE, *U.S.C.J.*
HON. JOHN R. BARTELS, *U.S.D.J.*
HON. ANTHONY J. TRAVIA, *U.S.D.J.*

MOORE, *Circuit Judge*:

The plaintiffs in this action, the Nassau Council of Women Strike for Peace, the Long Island Vietnam Moratorium Committee and four individuals belonging to or in sympathy with the organizational plaintiffs have followed for some time a course of concerted opposition to the United States military presence in Viet Nam through a variety of peaceful public protest activities. A part of their campaign has been the distribution of emblems or buttons to be displayed on the clothing and of decals designed for display in automobile windows. The decal (see appendix) and button are of the same design: a black circle, within which are several horizontal alternating red and white stripes which cover three of the four quadrants of the design. In the upper left quadrant are seven white stars on a blue field. In the center of the circle is a vertical black line extending from top to bottom and from the center point of the line are two radial black lines running at 45-degree angles to the rim of the circle. Thus the design gives the general impression of a black circle and a geometric design (slightly resembling an inverted trident) with a red, white and blue background which might be taken for a section of an American flag. On oral argument it was represented by plaintiffs that the black circle and trident is the official insignia of the Committee for a Sane Nuclear Policy and that it is generally recognized as the "peace symbol".

On January 15, 1970, the defendant William Cahn, District Attorney of the County of Nassau, New York, called a press conference for the purpose of announcing that, beginning the following Monday, he would, on the complaint of any person, criminally prosecute anyone wearing or displaying the emblems described above, which had been widely

distributed by plaintiffs. In his announcement, Cahn declared that these and similar emblems using recognizable representations of the American flag in conjunction with expressions of political or para-political ideology are in violation of section 136(a) of the New York General Business Law (McKinney's Consol.). That subsection makes it a misdemeanor, punishable by up to a year in jail or a fine of $1,000 for any person to

> . . . [i]n any manner, for exhibition or display, . . . place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or . . . expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which . . . shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature . . . .

Other subsections of the statute are specifically directed at physical uses of the flag, as defined in the section, which tend to "cast contempt upon" the American flag.[1] The statute also prohibits raffling or placing in pawn any such flag or representation thereof,[2] as well as public use of it as a receptacle for depositing or collecting money.[3]

Immediately upon hearing the District Attorney's announcement, plaintiffs requested and obtained a federal

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[1] New York General Business Law (McKinney's Consol.) §§136(d) and 136(f).

[2] §136(e).

[3] §136(g).

court order requiring defendant Cahn to show cause why he should not be enjoined from carrying out his announced intention to prosecute those wearing plaintiffs' buttons and from further threatening such prosecution. Upon motion of the plaintiffs for the convocation of a three-judge district court pursuant to 28 U.S.C. §§2281 and 2284, this court was appointed to hear and determine the issues.

The action is authorized by the Civil Rights Act, 42 U.S.C. §1983; federal jurisdiction is conferred by 28 U.S.C. §1343(3); and the declaratory and injunctive relief sought is authorized by 28 U.S.C. §2201 et seq.

The complaint (amended), couched in terms of a class action alleges in substance that the button or symbol in question is meant to indicate that the wearer desires the immediate cessation of American military operations in Viet Nam; that the individual plaintiffs wish to continue to display the symbol; and that the threat of prosecution has the effect of dissuading (1) large numbers of the plaintiff class from displaying the symbol and (2) the Committee from continuing to distribute it.

The relief sought is a declaration that the display and distribution of the symbol is "constitutionally protected conduct which may not be the subject of any criminal prosecution and that, to the extent that Section 136 of the General Business Law purports to authorize such a prosecution, it is unconstitutional." In their amended complaint, plaintiffs also requested "injunctive relief to prevent further deprivation under color of Section 136" of their constitutional rights including "a final injunction ordering the defendant, Cahn, and his agents to cease and desist from commencing any prosecution against any person as a result of such person's exhibiting or distributing the symbol in question, or any similar symbol designed to dramatize the wear-

er's political beliefs, in Nassau County." Subsequent to the commencement of these proceedings, however, the defendant agreed to refrain from commencing prosecutions under Section 136(a) during the pendency of this case, and further expressed his willingness to abide by the determination of this court with regard to the merits of the controversy. On that pledge, plaintiffs have represented that "no present need for equitable relief appears to exist," and we agree. However, that representation cannot be construed to alter the basic nature of the complaint, which is a request for relief from further prosecution and threatened prosecution under the contested statute. We have no reason to believe that relief will not be forthcoming by virtue of the District Attorney's voluntary agreement to abide by our decision. If, as plaintiff suggests, "changed circumstances require the exercise of equitable jurisdiction," we have the power to compel restraint from prosecution, *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), and we may retain jurisdiction to grant injunctive relief if the need should arise.

Therefore we do not consider the representations of the parties to amount to a withdrawal of a request for injunctive relief, without which, of course, this three-judge court would have no jurisdiction. 28 U.S.C. §2281; see *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965); *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). There being a continuing request for injunctive relief should circumstances require it, we have jurisdiction pursuant to §2281 to decide the issues. *Straut* v. *Calissi*, 293 F. Supp. 1339 (D.N.J. 1968). For the reasons given below, we hold that the threatened prosecutions cannot be carried out.

I.

The federal courts cannot stand at the elbows of law enforcement officers duly elected by the appropriate subdivisions of the States and advise them as to the exercise of their respective judgments in the enforcement of laws which they have sworn to uphold. At the same time our citizens are entitled not to be threatened with prosecution because of a particular interpretation given to a somewhat ambiguous statute by a prosecutor whose views on public issues may differ from others. The wielding of such individual power approaches too closely that exercised in the so-called totalitarian countries.

In this case both plaintiffs and the District Attorney have acted in conformity with the best precepts of our "law and order" society. Before taking any action which might have led to violence and arrest, they have sought an adjudication of their respective rights from the courts. Although the courts are by no means infallible, they can at least, where the circumstances warrant, give their best judgment with respect to the specific problem posed.

The challenged subsection of section 136 has never been interpreted by the New York courts; indeed as far as we are aware, subsection (a) has never been invoked in a criminal prosecution. In consideration of our view that the statute involved here is somewhat ambiguous, the question arises of abstention in order to give to the state courts an opportunity to construe the statute in the light of plaintiffs' fears. However, the Supreme Court's opinion in *Zwickler* v. *Koota*, 389 U.S. 241 (1967) is persuasive that under the circumstances here presented this court should assume jurisdiction. In *Zwickler* the Court said:

> In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. 389 U.S. at 248.

An additional reason which militates against waiting for a state court construction is found in the urgency for prompt resolution of the issue here. The Supreme Court dealt with the situation in the following statement:

> In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect. *Id.* at 252.

We believe that possibility exists here, and the plaintiffs are therefore entitled to an expeditious adjudication of the issues.

II.

The draftsman of this statute was doubtless most anxious, by a proliferation of words, to cover all contingencies. But the words should not becloud the real meaning and purpose of the statute.

Parsing the sentence, as if in an exercise in grammar: the verb or act is "place or caused to be placed", and the object is "word, figure, mark, picture, design, drawing, or any advertisement." But the all important inquiry is: upon what is it to be placed? Here again the draftsman is equally all inclusive. The statute specifies "flag, standard, color, shield or ensign of the United States of America,

* * *." In other words it is not "any" flag but rather *the* flag of the United States. The word "color" is meaningless in this context except as it be construed as the official flag, standard or shield of the United States.

After defining the prohibited acts and declaring violation to be a misdemeanor, the statute, however, proceeds to state what the words "flag, standard, color, shield or ensign" shall include. The definitions in section 136 are expanded to include a representation

> "evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the State of New York, or a picture or a representation, or either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of The United States of America or of the State of New York."

If the words of this definition are to be taken literally, they could describe an object which is not an American flag or, since the definition is phrased in the disjunctive, assign the determination of violation to the eye, mind and belief, without deliberation, of any person viewing the allegedly offending symbol. So read, the prohibition of subsection (a) would have an almost unlimited sweep. But constitutionality should not depend on hypothetical situations carried to the point of absurdity.

In holding section 136(a) to be constitutional and, properly interpreted, as in no way abridging First Amendment rights, we believe that the many cases cited to us relating

to symbolic speech become relevant if at all only tangentially to the problem posed here. We have no doubt that symbolic speech is constitutionally recognized, see *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969) (wearing of black armbands); *Stromberg* v. *California*, 283 U.S. 359 (1931) (public display of a red flag), but this statute as we construe it does not prohibit speech whether actual or symbolic. Nor does this statute compel an affirmative showing of proper respect for the flag, see *Board of Educ.* v. *Barnett*, 319 U.S. 624 (1943) (flag salute), or attempt to make the flag immune from political comment, see *Street* v. *New York*, 394 U.S. 576 (1969). The most recent case involving flag desecration statutes, *Cowgill* v. *California*, —— U.S. ——, 38 U.S.L.W. 3262 (January 19, 1970) likewise has no bearing on the issue presented here. In *Cowgill*, the defendant was convicted of flag mutilation for cutting up an actual American flag and fashioning it into a vest which was worn on a public street. In concurring in the vote to dismiss Cowgill's appeal, Mr. Justice Harlan, with whom Mr. Justice Brennan joined, noted that there was no attempt at dissemination of ideas apparent in this conduct from the record on appeal.

However, whether or not plaintiffs' emblems constitute symbolic expressions of political ideologies "akin to 'pure speech'"[4] and thus are entitled to plenary protection under the First Amendment, this subsection, on its face, in our opinion simply does not apply to the display and distribution of these buttons. Subsection (a) does not purport to circumscribe every use of the flag or representations thereof; its thrust is to prohibit any disfiguration or alteration

[4] *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 505-506 (1969).

of the flag itself as well as to prevent commercial exploitation of the national and the State flags or shields for private benefit.[5] Desecration of the flag for most purposes is governed by subsections (d) and (f) of the statute.[6] Subsec-

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[5] The constitutionality of a statute virtually identical with the present New York statute was upheld by the Supreme Court in *Halter* v. *Nebraska*, 205 U.S. 34 (1907).

Although the act involved in *Halter* was the placing of the American flag as an advertisement on a bottle of beer, the right of the State to legislate on the subject of the flag and the reasons therefor have not changed over the years. Even in 1907 apparently more than half of the states had statutes similar to the Nebraska statute.

As the former Mr. Justice Harlan said, in upholding the constitutionality of the state statute:

> From the earliest periods in the history of the human race, banners, standards and ensigns have been adopted as symbols of the power and history of the peoples who bore them. It is not then remarkable that the American people, acting through the legislative branch of the Government, early in their history, prescribed a flag as symbolical of the existence and sovereignty of the Nation. Indeed, it would have been extraordinary if the Government had started this country upon its marvelous career without giving it a flag to be recognized as the emblem of the American Republic. For that flag every true American has not simply an appreciation but a deep affection. No American, nor any foreign born person who enjoys the privileges of American citizenship, ever looks upon it without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot. 205 U.S. at 41.

And recently in *Street* v. *New York*, 394 U.S. 576, 594 (1969), the Court recognized that:

> disrespect for our flag is to be deplored no less in these vexed times than in calmer periods in of our history.

[6] New York General Business Law §136:

> "Any person who:
>
> (d) shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or
>
> * * * * *

tions (a), (b) and (c), when read together, further prohibit any representation in any form calculated to associate the symbols of sovereignty of the United States and the State of New York with any private endeavor. Thus subsection (b) prohibits exposure to public view, manufacturing, selling or giving away any article of merchandise or container for merchandise bearing a representation calculated to evoke association with the sovereign. Subsection (c) proscribes a similar use of the flag or other sovereignty symbol by imprinting it on checks or letters for "business purposes or correspondence." Subsection (a) prohibits display of a national or State symbol upon which is painted, printed, placed, affixed, etc. "any word, figure, mark, picture, design, or drawing, or any *advertisement of any nature*. . . .". (emphasis added). A reading only of this subsection together with the section's broad definition of a flag or symbol might lead one to conclude, as did the District Attorney, that cluttering up a flag or a representation of it with any sort of mark for any purpose would be covered by subsection (a). Read in the context of the seven separate pro-

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(f) shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America . . .

Shall be guilty of a misdemeanor."

Paragraph (d), *supra*, was before the Supreme Court in *Street* v. *New York*, 394 U.S. 576 (1969). Stating preliminarily that "we resist the pulls to decide the constitutional issues involved in this case on a broader basis than the record before us imperatively requires," the Court held only that the statute "was unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag." 394 U.S. at 581. Thus the statute continues in force and may be invoked, in an appropriate case, to punish conduct which seeks to "cast contempt upon" the flag. See *New York* v. *Radich*, —— N.Y.2d —— (1970).

hibitions of section 136, however, it seems clear that subsection (a) was not intended to cover nearly so much territory. The District Attorney's broad reading of the subsection would make criminal the possession of all those reproductions of the face of President John F. Kennedy superimposed upon a picture of the American flag which hang on the walls of shops, homes and offices all over this country. And what of the millions of celluloid campaign buttons which for generations, including the time before this statute was enacted, have carried the photographs of the aspiring President and other candidates against a background of one or more American flags in full color? Obviously it was not the intent of the New York legislature when it enacted this law to turn its citizens into criminals merely because they chose to express their political preferences by wearing such buttons on their lapels.

We can only conclude that no subsection of section 136 was intended to apply to the wearing or distribution of these buttons. Were it so interpreted, the statute might well be unconstitutionally overbroad. However, a commonsense reading of section 136 in its entirety compels us to conclude otherwise. It is the flag itself which the statute seeks to protect from physical alteration, and no attempt to alter an actual American flag is presented by the plaintiffs' buttons and decals. Insofar as the all-inclusive definition of "flag" contained in the statute following the prohibitory sections may be construed to apply to the prohibition contained in subsection (a), it is impermissibly broad and cannot constitutionally be invoked to make criminal the wearing and distribution of these symbols. However, subsection (a) itself is not unconstitutional. As we view the statute, while the broad statutory definition becomes

useful in manifesting the scope of other prohibitions within the section, that definition is not necessary to affect the legitimate purpose of subsection (a).

Therefore it is not lack of constitutionality of the subsection which concerns us but rather interpretation of the whole statute as it might apply to the symbol in issue here. If there be violation, it must be found within the statute itself. There is no claim that the wearing or display of the symbol would incite to riot or public disorder, that it offends public decency by casting contempt on the flag or that it subjects the flag to commercial exploitation. We can say here as did the Court in *Halter* that "Before this court can hold the statute void it must say that ["The statute . . . has no reasonable connection with the common good * * *, order and well-being of the people"] and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge." (p. 45).

The judgment in this case is that, properly applied, section 136(a) is not unconstitutional; that the particular symbol affixed to the complaint whether worn, displayed or distributed does not come within the purview of section 136(a); and that any such wearing, display or distribution does not constitute a crime as defined therein. The court limits its opinion to the symbol before it and expresses no views as to any other or different symbol or statute.

It is so ordered.

Brooklyn, N. Y.
June 22, 1970.

LEONARD P. MOORE, USCJ
JOHN R. BARTELS, USDJ

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Dissenting Opinion of Hon. Anthony P. Travia

TRAVIA, *J.*, concurring in part and dissenting in part:

I am doubtful about the jurisdiction of this three-judge Court to hear the present action in light of the plaintiff's notation at p. 24 of their Memorandum in Support of Plaintiffs' Motion for Summary Judgment that ". . . no present need for equitable relief appears to exist."[1]

The three-judge panel was convened pursuant to '28 U.S.C.A. §§ 2281, 2284. Section 2281 provides for such a court where an injunction is sought to restrain the enforcement of a State statute on the ground of its unconstitutionality. The section was adopted to reduce the dangers of single Federal judges' enjoining State legislation, and was framed to apply only where injunctive relief was sought. *See Swift & Co.* v. *Wickham*, 382 U.S. 111, 120, 127 (1965). Under the analogous provisions of 28 U.S.C.A. § 2282, dealing with Federal statutes, when plaintiffs seek only a declaration of the invalidity of legislation, without also ". . . affirmatively [seeking] to interdict the operation of a statutory scheme," a single judge alone must hear the case. *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). Since injunctive relief is no longer being sought in the present case, this Court should have dissolved itself into a single-

[1] The full text of the statement reads:

"The defendant herein has represented to the court on several occasions that he will refrain from commencing prosecutions under Section 136(a) during the pendency of these proceedings. He has also pledged to respect the determination of this court on the merits. Accordingly, no present need for equitable relief appears to exist. However, should changed circumstances require the exercise of equitable jurisdiction, this court possesses ample power to grant injunctive relief. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965)."

judge court. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152-155 (1963); *see Smith* v. *State Executive Committee of Dem. Party of Ga.*, 288 F. Supp. 371, 374 (N.D. Ga. 1968). *But see Straut* v. *Calissi*, 293 F. Supp. 1339, 1340 at n. 1 (D.N.J. 1968).

However, since the merits have been reached and disposed of by the majority in a manner with which I cannot agree, I must dissent.

First, Section 136(a) of the New York General Business Law does not appear to apply only to commercial uses of the United States Flag. Rather, it applies to the placing of "... *any* word, figure, mark, picture, design, drawing, *or any* advertisement, *of any* nature upon *any* flag ... of the United States ..." when this is done "[i]n *any manner*, for exhibition or display...." (Emphasis added). Read with the all-inclusive definition of a flag following subsection (g), it is apparent that the provision in question was intended to apply, and does apply, to the decals and buttons which plaintiffs seek to immunize from illegality. On a recognizable representation of the flag, including both the stars and the stripes, which are characteristic of the American Flag, as they would appear if the edges of the Flag were cut off in a circular manner, the plaintiffs have placed, "[i]n [some] manner, for exhibition [and] display ... [a] figure, mark, picture, design, [or] drawing...." Here the statute reads in the disjunctive: "... or any advertisement ...," suggesting that advertisements alone were not meant to be proscribed.

The majority suggests that numerous pictures of President John F. Kennedy on a background of the American Flag would be proscribed by § 136(a). However, these pictures would come under the exception provided in the second paragraph following § 136(g), which states that

"This section shall not . . . be construed to apply to [an] ornamental picture, article of jewelry . . . on any of which shall be printed, painted or placed, said flag . . . disconnected and apart from any advertisement." Indeed, this limited exception, which does not even apply to advertisements, suggests that except for representations of the flag which fall within it, all such representations are proscribed.

Since the decal and button designs are proscribed, the issue of the constitutionality of that proscription must be reached. I agree with the majority that the statute in general is constitutional, but I further conclude that the statute, as applied to these items, must be upheld. The special nature of the American Flag has been recognized in several decisions. *See Halter* v. *Nebraska*, 205 U.S. 34 (19); *People* v. *Radich*, —— N.Y. 2d —— (1970). Indeed, the Supreme Court in *Street* v. *New York*, 394 U.S. 576, 594 (196), noted that ". . . disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history." The "peace symbol" or anything else superimposed upon the flag has the effect of destroying the integrity of the flag and reducing its status as ". . . a special kind personalty." *Id.* at 616 (Fortas, *J.*, dissenting). The State has a legitimate interest in preserving the flag's integrity from impingement by different groups which seek to turn it from its central purpose as a symbol of America to a symbol of their own special concerns.

Section 136(a) attempts to achieve that purpose by its provisions which are limited in their scope to prohibiting the conduct of placing and displaying any mark upon the flag. No speech or communicative conduct is in any way restricted. Nor is the expression of any point of view on any issue, including the merits of the flag itself and what it stands for, limited. Unlike the statute in *Stromberg* v.

California, 283 U.S. 359 (1931), § 136(a) does not attempt to suppress the communication of any particular ideas, *cf. United States* v. *O'Brien*, 391 U.S. 367, 382 (1968) but, in a politically neutral manner only seeks to preserve the national banner. And, unlike the situation in *Street* v. *New York, supra*, where the Court feared that the defendant may have been convicted for his words rather than his conduct, in a prosecution under § 136(a) speech can play no part.

ANTHONY P. TRAVIA
U.S.D.J.

Notice of Appeal

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

70 Civ. 56

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEUBERGER, RHODA SEIDEL, and BARBARA SHACK,

Plaintiffs,

—against—

WILLIAM CAHN, District Attorney, Nassau County and EUGENE NICKERSON, County Executive, Nassau County,

Defendants.

SIRS:

Notice is hereby given that William Cahn, District Attorney, Nassau County, defendant above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 22nd day of June, 1970.

Dated: New York, New York
July 10, 1970

Yours, etc.,

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Order Denying Motion to Expedite Appeal

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of August, one thousand nine hundred and seventy.

LONG ISLAND VIETNAM MORATORIUM COMMITTEE; NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE; BARBARA SPADANUTA; MAE NEUBERGER; RHODA SEIDEL; BARBARA SHACK,

Plaintiffs-Appellees,

—v.—

WILLIAM CAHN, District Attorney, Nassau County; EUGENE NICKERSON, County Executive, Nassau County,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated August 10, 1970 for a preference in the argument of the appeal be and it hereby is denied.

J. JOSEPH SMITH
Circuit Judge

Supreme Court, U.S.
FILED
OCT 19 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 709

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEUBERGER, RHODA SEIDEL, and BARBARA SHACK,

Petitioners,

against

WILLIAM CAHN, District Attorney, Nassau County and, EUGENE NICKERSON, County Executive, Nassau County,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CAHN'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEUBERGER, RHODA SEIDEL, and BARBARA SHACK,

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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CAHN'S BRIEF IN OPPOSITION

Question Presented

Whether this case is of such imperative public importance as to warrant the extraordinary relief of certiorari prior to judgment despite the fact that the appeal by respondent District Attorney is before the United States Court of Appeals for the Second Circuit.

Statement

The facts of the case are stated fully in the opinions of the United States District Court for the Eastern District of New York (Petitioners' Appendix, at pp. 1a-18a).

Argument

Petitioners instituted an action in the District Court challenging the constitutionality of New York's General Business Law § 136(a) *if* it proscribed the display or distribution of an emblem consisting of a circular representation of what appears to be a portion of the American flag on which is superimposed the peace symbol.* Petitioners requested a declaration that the display or distribution of the emblem is constitutionally protected conduct and that the statute is unconstitutional *to the extent* that it purports to authorize prosecution for the display or distribution of the emblem.

On June 22, 1970, the District Court, sitting as a three-judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284, declared: "that properly applied, section 136(a) is not unconstitutional; that the particular symbol affixed to the complaint whether worn, displayed or distributed does not come within the purview of section 136(a); and that any such wearing, display or distribution does not constitute a crime as defined therein" (Petitioners' Appendix, at p. 13a). Petitioners thus obtained the relief they requested and, therefore, did not file a notice of appeal; and, of course, their time to appeal would have long since elapsed in any event.

However, on July 10, 1970, respondent Cahn filed a notice of appeal to the Court of Appeals for the Second Circuit. In his brief, which was filed on September 28,

*The emblem is reproduced in Petitioners' Appendix, at p. 14a.

1970, respondent argues that the District Court should have abstained since it found the challenged statute susceptible of a construction which avoided petitioners' constitutional challenge and, in the alternative, that if the statute proscribes the emblem in question, it is a legitimate exercise of the State's power to protect the integrity of the American flag.

Although petitioners prevailed in the District Court, their petition for certiorari prior to judgment might have some basis if they were seeking affirmance of the District Court's judgment. The fact of the matter is, however, that petitioners seek *reversal* of that judgment. In other words, petitioners contend that because respondent Cahn has appealed to the Court of Appeals they may employ the remedy of certiorari prior to judgment as a vehicle for seeking reversal of a judgment which granted them the relief they sought! Such a petition is without precedent.

If, as a result of the decision of the Court of Appeals petitioners should become aggrieved parties, they will have ample opportunity to petition for certiorari. And, if certiorari is then granted, this Court will have the benefit of the Court of Appeals' consideration of the issues in the case.

Since petitioners acknowledge that respondent Cahn has respected his pledge to refrain from prosecuting petitioners pending the outcome of this case (Petition, at p. 6), it is evident that time is not of the essence. Indeed, the claim of urgency is belied by the fact that petitioners have waited more than two months from the date respondent filed his notice of appeal before they filed their petition. Moreover, the fact that counsel for petitioners allege that they represent more than 40 persons in the City of New York who have been arrested for displaying the emblem in question is of no consequence. The petition makes no mention of the status of those alleged arrests, their statutory basis, whether they occurred within the jurisdiction

of the District Court, or what, if any, attempts have been made to seek redress in the State courts. In any event, a determination of the issues in this case by the Court of Appeals may very well resolve the legitimacy of those alleged arrests, and that determination will be the law throughout the State.

In sum, the petition appears to be no more than an attempt to circumvent the jurisdictional rule enunciated by this Court in *Mitchell* v. *Donovan* —— U. S. ——, 38 U.S.L.W. 4514 (June 15, 1970), concerning appeals from orders of three-judge district courts neither granting nor denying an injunction.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, October 13, 1970.

Respectfully submitted,

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